No. 88-1321

FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

STEVEN A. SMITH
(Counsel of Record)
JAMES H. SCHINK

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Of Counsel:
STEVEN K. COVEY
NAVISTAR INTERNATIONAL
TRANSPORTATION CORPORATION
401 N. Michigan—24th Floor
Chicago, Illinois 60611

DATED: April 19, 1989

Pandick Midwest, Inc., Chicago • (312) 733-6000

TABLE OF CONTENTS

		Page
1.	Respondent's interpretation of the Ohio administrative regulation is in derogation of the State's role under the Clean Air Act	2
2.	The liability determination made by respondent should not be accorded considerable deference	4
3.	Respondent's interpretation of the Ohio administrative regulation is plainly erroneous and inconsistent with the terms of that regulation	5
4.	There is a direct conflict between the Sixth and Seventh Circuits	8

The listing of parties appears at page ii of the Petition (hereafter "Pet.").

TABLE OF AUTHORITIES

Cases:	Page
AFL-CIO v. Donovan, 757 F.2d 330 (D.C. Cir. 1985)	5
Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979)	3
Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984)	2
Bethlehem Steel Corp. v. EPA, 638 F.2d 994 (7th Cir. 1980)	9
Dirks v. SEC, 463 U.S. 646 (1983)	4
Dougherty v. Torrence, 2 Ohio St. 3d 69, 442 N.E.2d 1295 (1982)	6
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council, 108 S. Ct. 1392 (1988)	4, 5
Florida Power & Light Co. v. Costle, 650 F.2d 579 (5th Cir. 1981)	2
Indiana & Michigan Elec. Co. v. EPA, 509 F.2d 839 (7th Cir. 1975)	9
Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980)	4
INS v. Cardoza—Fonseca 480 U.S. 421 (1987)	4
L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664 (D.C. Cir. 1982)	6
Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198 (Iowa 1971)	10
National Steel Corp., Great Lakes Steel Div. v. Gorsuch, 700 F.2d 314 (6th Cir. 1983)	3

Cases—Continued

	Page
Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)	4
NLRB v. Yeshiva Univ., 444 U.S. 672 (1980)	4
Ohio Envtl. Council v. United States EPA, 593 F.2d 24 (6th Cir. 1979)	2
Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975)	2,3
United States v. Interlake, Inc., 432 F. Supp. 985 (N.D. Ill. 1977)	2
United States v. Louisiana-Pacific Corp., 682 F. Supp. 1141 (D. Colo. 1988)	9
United States v. Menasche, 348 U.S. 528 (1955)	6
United States v. Riverside Laboratories, Inc., 678 F. Supp. 1352 (N.D. Ill. 1988)	2
United States v. Town of N. Hempstead, 610 F.2d 1025 (2d Cir. 1979)	9
United States v. West Penn Power Co., 460 F. Supp. 1305 (W.D. Pa. 1978)	9

Statutes and regulations:

Clean Air Act, 42 U.S.C. 7401 *et seq.*	*passim*
§ 107(a), 42 U.S.C. 7407(a)	2
§ 110, 42 U.S.C. 7410	3
§ 110(a)(2), 42 U.S.C. 7410(a)(2)	3
§ 120, 42 U.S.C. 7420	1
Ohio Admin. Code (1987):	
§ 3745-21-01(D)(8)	5,6
§ 3745-21-09(U)	8
§ 3745-21-09(U)(1)(a)(iii)	6,7
§ 3745-21-09(U)(2)(c)	7,8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

This is a watershed case in federal environmental law respecting Clean Air Act noncompliance proceedings. It is one of the first noncompliance proceedings brought to a liability determination pursuant to Section 120 of the Clean Air Act, 42 U.S.C. 7420. The case is being widely followed by segments of the business community, the environmental bar, and the general press.

To avoid the significant questions presented for review, respondent has been compelled to refashion for this Court several of its arguments raised below. Respondent now urges that this Court's previous decisions allowing *de novo* review of administrative interpretations should properly be read to accord considerable deference to the respondent's liability determination below. Similarly, in a revealing *volte face*, respondent now argues that the exclusion of evidence of technological and economic infeasibility comported with constitutional due process since such evidence was to be retained in the record for the penalty phase of the noncompliance proceeding.

1. Respondent's interpretation of the Ohio administrative regulation is in derogation of the State's role under the Clean Air Act.

Respondent first argues that Congress placed the primary responsibility for enforcement of the Clean Air Act on EPA, and that considerable deference should thus be paid the respondent's interpretation of the Ohio administrative regulation. (Resp. Br. 6) On the contrary, courts have consistently recognized that it is for the state, not EPA, to interpret its SIP, and that EPA's interpretation is entitled to no deference.[1] Thus, for example, the Fifth Circuit in *Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981), clearly stated that a state's interpretation of its state implementation plan is of great moment in contrast to EPA's secondary role under the Clean Air Act:

> [I]t must be emphasized that EPA is to be accorded no discretion in interpreting state law. Quite the contrary is true: '[the United States] should defer to the state's interpretation of the terms of its air pollution control plan when said interpretation is consistent with the Clean Air Act.' *United States v. Interlake, Inc.* 432 F. Supp. 985, 987 (N.D. Ill. 1977). *See also Ohio Envtl. Council* [*v. EPA*], 593 F.2d [24] at 29 [(6th Cir. 1979)] (EPA reliance on state's interpretation of state law is consistent with the agency's secondary role under the Clean Air Act).

650 F.2d at 588.

As this Court noted in *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975), Section 107(a) of the Clean Air Act, 42 U.S.C. 7407(a), importantly provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such

---

[1] *See, e.g., Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1035-36 (7th Cir. 1984); *United States v. Riverside Laboratories, Inc.*, 678 F.Supp. 1352, 1355-57 (N.D. Ill. 1988).

State. . . ." The Act accords to the states the responsibility and discretion to formulate acceptable plans, subject only to the limitations of the Act itself:

> Under § 110(a)(2) [of the Act (42 U.S.C. § 7410(a)(2))], the Agency is *required* to approve a State plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements .... [S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever the mix of emission limitations it deems best suited to its particular situation.

421 U.S. at 79.

Thus, while we agree with respondent that EPA reviewed the Ohio SIP prior to its approval (Resp. Br. 6), EPA's review was limited to whether the several conditions set forth in Section 110(a)(2) of the Act, 42 U.S.C. 7410(a)(2), had been met. None of those threshold conditions involved the appropriate definition of a "coating line" or the application of the Ohio SIP to refinishing or non-metallic part spraying operations at issue here. EPA's review of the Ohio SIP consequently did not encompass the instant matters to be construed, for which EPA has no special competence.

EPA's role is hence limited to one of oversight—to ensuring in the first instance that the state plan satisfies the general requirements of the Clean Air Act and will enable the state to achieve attainment of national air quality standards. *See Train, supra,* 421 U.S. at 66, 79; *National Steel Corp., Great Lakes Steel Div. v. Gorsuch,* 700 F.2d 314, 322 (6th Cir. 1983). This principle has been employed to invalidate EPA attempts to interfere in state regulatory structures in various contexts. *See, e.g., Alabama Power v. Costle,* 636 F.2d 323, 364 (D.C. Cir. 1979) (EPA may not dictate to state how it will manage internal growth by use of available increments).

The decision by the Sixth Circuit in this case, which would allow EPA to essentially rewrite Ohio's regulation defining a coating line and effecting the refinishing exemption and the metallic parts provision, is in derogation of the State's role under the Clean Air Act. EPA's secondary role in narrowly reviewing the Ohio SIP to determine its conformity with general requirements of the Act exhibits no special competence and does not warrant considerable deference.

2. The liability determination made by respondent should not be accorded considerable deference.

Respondent's protestations to the contrary notwithstanding (Resp. Br. 8-9), this Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), unequivocally held that where purely legal questions are at issue, the court has broad authority to conduct an independent and *de novo* review of agency decisions. In like fashion, this Court has regularly endorsed independent and *de novo* reviews of legal questions, substituting its judgment for that of an agency, whose interpretations were accorded no deference. *See Dirks v. SEC*, 463 U.S. 646, 655-64 (1983) (*de novo* review of securities regulation); *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 673-84 (1983) (same); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 678-80 (1980) (same); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 695 n.9 (1980) (same).

Further, this Court in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 108 S. Ct. 1392 (1988), did not defer to an administrative interpretation as respondent has represented. (Resp. Br. 8) Rather, this Court rejected the NLRB's construction of a statutory provision, holding that the Board's interpretation would "raise serious constitutional problems. . . ." *Id.* at 1397. In the instant matter, constitutional considerations are likewise implicated by respondent's broad construction of the coating line definition and its exclusion of infeasibility evidence below. Consequently,

respondent's interpretation of the Ohio regulation should be rejected just as the *DeBartolo* Court dismissed the Board's unduly broad construction of the National Labor Relations Act.

In the above cases, the courts used traditional tools of construction to ascertain intent. Respondent has not demonstrated how the instant issues respecting regulatory definitions and exemptions are anything less than legal questions to which independent and *de novo* review should be applied. Moreover, no aspect of the instant issues regarding administrative definitions and exemptions implicates the respondent's special competence. In fact, respondent's limited review of the Ohio SIP afforded it no special competence in interpreting the coating line definition, refinishing exemption or metallic part provision in issue here. Respondent's interpretation of the Ohio SIP should thus not be accorded considerable deference.

3. Respondent's interpretation of the Ohio administrative regulation is plainly erroneous and inconsistent with the terms of that regulation.

The Sixth Circuit held that two of petitioner's coating operations were regulated despite the absence of bake ovens in the coating process. 828 F.2d at 287, Pet. App. A-10. This finding is inconsistent with the terms of Ohio Administrative Code Rule 3745-21-01(D)(8), which makes clear that paint booths must have bake ovens to be regulated. Respondent's argument (Resp. Br. 9-10) that Rule 3745-21-01(D)(8) *must* be interpreted to include petitioner's paint booths R004 and R005 in order to effectuate the broad purposes of the Clean Air Act rings hollow. This, because the plain meaning of Rule 3745-21-01(D)(8) suggests otherwise.

The first source in interpreting a statute or regulation is the language of the provision at issue. *See AFL-CIO v. Donovan*, 757 F.2d 330, 334 (D.C. Cir. 1985). It is a basic tenet of

statutory construction that, whenever possible, effect must be given to *every* word and clause of a statute or regulation. *United States v. Menasche,* 348 U.S. 528, 538-39 (1955). "When the wording of a statute is clear and unambiguous on its face, judicial interpretation is not required; rather, the court must give effect to the words used." *Dougherty v. Torrence,* 2 Ohio St. 3d 69, 70, 442 N.E.2d 1295, 1296 (1982).

Here, the specific SIP provision EPA seeks to enforce against petitioner applies only to miscellaneous metal part or product *coating lines. See* O.A.C. § 3745-21-09(U)(1)(a)(iii). In turn, the plain language of the SIP makes clear that a coating line must have three separate components—a coating applicator, a flash-off area *and* an oven:

> (8) "Coating line" means a *series* of one or more coating applicators, flash-off areas *and ovens* wherein a surface coating is applied, dried and/or cured.

O.A.C. § 3745-21-01(D)(8) (emphasis added). The definition specifies that the components must be in a series, and provides that a single coating line may contain one or more of each of the required elements. A coating line thus consists of a *series* consisting of one or more coating applicators, one or more flash-off areas, *and* one or more ovens.

Because the definition of coating line in the Ohio SIP clearly requires bake ovens, the respondent's reliance on extrinsic evidence of EPA's intent in construing the regulation is unfounded. "It is well-settled that regulations cannot be construed to mean what an agency intended but did not adequately express." *L.R. Willson & Sons, Inc. v. Donovan,* 685 F.2d 664, 675 (D.C. Cir. 1982).

Extrinsic evidence that EPA *intended* the SIP to apply to booths without ovens cannot change the fact that the SIP provision at issue simply does not regulate petitioner's booths R004 and R005, which do not have ovens. Accordingly, the

respondent's determination that these booths are in violation of O.A.C. § 3745-21-09(U)(1)(a)(iii) is plainly erroneous as a matter of law.

Respondent makes no attempt (Resp. Br. 9-10) to argue that its interpretation of the refinishing exemption was necessary to effectuate the assertedly broad goals of the Clean Air Act. The Ohio SIP expressly exempts "application of a refinishing coating to motor vehicles" from the requirements of O.A.C. § 3745-21-09(U)(1)(a)(iii). O.A.C. § 3745-21-09(U)(2)(c). Petitioner's refinishing operations clearly fall within the terms of this exemption. Nevertheless, the respondent held the exemption does not apply to petitioner because petitioner refinishes trucks prior to sale and because the exemption assertedly was not intended to apply to petitioner. (Pet. App. E-21, 22) Neither of the respondent's reasons is sufficient to overcome the plain language of the regulation.

The respondent's finding that petitioner does not "refinish" trucks is based on an erroneously narrow interpretation of the term "finish." EPA erroneously determined below that trucks that have not been finished (completed) cannot be *re*finished. In doing so, EPA ignored that the verb "finish" also means to apply paint to a surface. Petitioner refinishes "finished" (painted) trucks to correct paint defects prior to releasing the trucks for sale in three of the paint booths at issue here. These refinishing operations, which are similar to those performed at body shops, clearly fall within the common meaning of the refinishing exemption in O.A.C. § 3745-21-09(U)(2)(c).

The EPA's finding that the exemption applies only to body shops and does not apply to petitioner is likewise unfounded. Whether the refinishing operations at the petitioner's facility fall within the refinishing exemption is certainly a situation that easily could have been foreseen. Had Ohio intended the refinishing exemption to apply only to body shops—and not to refinishing operations at petitioner's facility—it could have

included such a limitation in the rule. In short, Ohio readily could have defined "refinishing" in any fashion it wished and it would have been equally easy for respondent to have disapproved the exemption proposed by Ohio. Instead, Ohio did not define "refinishing" to limit its application only to body shops and EPA approved the broad exemption.

In brief, respondent's determination that the refinishing exemption in O.A.C. § 3745-21-09(U)(2)(c) applies only to body shops and not to the refinishing operations conducted at the petitioner's facility is plainly erroneous and inconsistent with the terms of that regulation. The rule simply is not so limited. Further, certain parts coated on several of petitioner's lines are made only of non-metallic materials and have no metal formed on them. Emissions from these non-metallic painting operations are clearly not regulated under the Ohio administrative rule, which plainly pertains solely to emissions from the coating of miscellaneous metal parts. O.A.C. § 3745-21-09(U). EPA's finding that non-metallic coating operations are regulated is again plainly erroneous and inconsistent with the terms of Ohio's administrative regulation.

4. There is a direct conflict between the Sixth and Seventh Circuits.

Respondent argues (Resp. Br. 11) that no due process considerations were implicated by the exclusion of evidence of technological and economic infeasibility below because petitioner can raise its infeasibility claims during the penalty phase of the Section 120 proceeding. Yet, respondent fails to explain how and in what manner petitioner's infeasibility claims can be raised during the penalty phase. Nor does respondent cite any authority for its proposition that due process considerations are inapposite where infeasibility claims can be made during the penalty, but not the liability, phase of Section 120 proceedings. In short, respondent identifies no decisional law suggesting that

due process concerns are met simply by deferring infeasibility claims until the penalty calculation stage of noncompliance proceedings.

On the issue of admissibility of evidence of infeasibility, the Sixth Circuit's decision sharpens a clear conflict in the circuits. The Seventh Circuit held in *Indiana & Michigan Elec. Co. v. EPA*, 509 F.2d 839, 844-45 (7th Cir. 1975), that U.S. EPA is not required to consider technological feasibility and economic reasonableness prior to approval of a state implementation plan only because arguments concerning technological feasibility and economic unreasonableness are allowed to be raised as to a specific source in the course of an enforcement proceeding. *See also, United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1166 (D. Colo. 1988) (noncompliance begins only when air emission control equipment becomes "technically available"); *United States v. West Penn Power Co.* 460 F.Supp. 1305, 1307-12 (W.D. Pa. 1978) (same); *United States v. Town of N. Hempstead*, 610 F.2d 1025, 1027 and n.3 (2d Cir. 1979) (same). The Seventh Circuit reaffirmed that technological infeasibility and economic unreasonableness are relevant in an enforcement proceeding in *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994, 1005 (7th Cir. 1980).

These authorities reflect the basic constitutional tenet that application of a regulation (whether adopted through the legislative or administrative process) is permissible only if reasonable and not arbitrary or capricious as specifically applied. In this proceeding, petitioner contends that the Ohio regulation is unreasonable as specifically applied to petitioner because its compliance with the rule is technologically infeasible and economically unreasonable. Because compliance with the Ohio regulation would be infeasible, its provisions cannot be applied to petitioner.

Because petitioner had no meaningful opportunity to present its claims of technical and economic infeasibility during the Ohio SIP adoption process, constitutional due process

safeguards require that such claims be considered during the liability phase of this proceeding. The EPA's exclusion of evidence of these issues improperly "chok[ed] off an entire claim or defense," *Lewis v. Buena Vista Mut. Ins. Ass'n*, 183 N.W.2d 198, 200-01 (Iowa 1971), and rendered arbitrary and capricious the application of the Ohio regulation to petitioner. The Sixth Circuit's decision affirming this exclusion should therefore be reviewed.

CONCLUSION

We respectfully submit that certiorari should be granted.

Respectfully submitted,

STEVEN A. SMITH
(Counsel of Record)
JAMES H. SCHINK

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Of Counsel:
STEVEN K. COVEY
NAVISTAR INTERNATIONAL
TRANSPORTATION CORPORATION
401 N. Michigan—24th Floor
Chicago, Illinois 60611

DATED: April 19, 1989